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No. [redacted] 53

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

JOHN PATTON, HAROLD CONANT AND JACK BAKER,

VS.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS, JOHN PATTON, HAROLD CONANT AND JACK BAKER.

CLAUDE NOWLIN,
JACOB R. SPIELMAN,
M. M. THOMAS,
Attorneys for the Appellants, John Patton, Harold Conant and Jack Baker.

INDEX

I.

QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS TO THE SUPREME COURT OF THE UNITED STATES.

"After the commencement of a trial in a Federal Court, before a jury of twelve men upon an indictment charging a crime punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government, through its official representative in charge of the case, consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?"

II.

PROPOSITION OF LAW RELIED UPON BY APPELLANTS IN ANSWER TO THE QUESTION CERTIFIED.

Where defendants are tried in the United States District Court for a felony upon their plea of not guilty, the jurisdiction of the court to pronounce judgment of conviction and sentence upon them rests upon a unanimous verdict of guilty duly returned by a constitutional jury of twelve, and no agreement between the representative of the Government and the defendants and their counsel can change the tribunal provided by the Constitution so as to confer jurisdiction upon the court to pronounce judgment and sentence upon a finding of guilty by eleven jurors.

INDEX TO AUTHORITIES

Cooley's Constitutional Limitations, (7th Ed. 1903), 458-459 17
Capitol Traction Company vs. Hof, 174 U. S. 1; 19 Sup. Ct. 580-585; 43 L. Ed. 873 25
Crain vs. United States, 162 U. S. 625; 40 L. Ed. 1097 27
Caucemi vs. People, 18 N. Y. 128 . . . . . 29, 35
Dickinson vs. United States, 159 Fed. 801 14
Diaz vs. United States, 223 U. S. 442; 56 L. Ed. 500 32
Frank, et al. vs. United States, 192 Fed. 864 12
Freeman vs. United States, 227 Fed. 732 23
Grove vs. United States, 3 Fed. (2nd) 965 30
Gibson, et al. vs. United States, 31 Fed. (2nd) 19 . . 33
Hill vs. People, 16 Mich. 357 36
Low, et al. vs. United States, 169 Fed. 86 . . . . . 9, 28, 34
Maxwell vs. Dow, 176 U. S. 581; 44 L. Ed. 597 . . . . 8, 34
Queenan vs. Oklahoma, 71 Pac. 218; 190 U. S. 548-551; 47 L. Ed. 1175 18
Schick vs. United States, 195 U. S. 65; 49 L. Ed. 99 . . . . . 10, 28
State vs. Mansfreed, 41 Mo. 470 35
Thompson vs. Utah, 170 U. S. 343; 42 L. Ed. 1061 . . . . . 4, 9, 21, 30, 33, 34
Thompson on Trials, Section 6 28
Territory of Montana vs. Ah Wah, et al., 1 Pac. 732 . 34

No. 781.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

JOHN PATTON, HAROLD CONANT AND JACK BAKER,

VS.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANTS, JOHN PATTON, HAROLD CONANT AND JACK BAKER.

STATEMENT.

Appellants were sentenced by the United States District Court for the Western District of Oklahoma to twenty-three years imprisonment, together with certain fines assessed against them, for violation of the con-

spiracy statute and certain violations of Section 39 of the Penal Code. Sentences were made to run concurrently so that the total period of imprisonment assessed against each appellant is eight years.

For convenience permit us to refer to these appellants as defendants as they appeared in the trial court.

Concretely, the certified question, stated in a little different language from the language of the Circuit Court of Appeals, is whether or not the District Court could lawfully impose a sentence of imprisonment in the federal penitentiary upon the defendants, where the defendants plead not guilty to the felony charged against them and were found guilty by a purported verdict returned by eleven jurors, the twelfth juror having been excused during the progress of the trial by the consent of the defendants and the government and the trial proceeding to the remaining eleven men as a jury by agreement between the defendants, their counsel and counsel representing the government.

Defendants did not have an opportunity to orally argue this question to the Circuit Court of Appeals. When counsel for defendants stated the question, the Circuit Court of Appeals stated to counsel that it would not be necessary for counsel to present this question as they desired to hear from the United States Attorney upon that feature of the case. However, counsel for defendants, of course, filed their brief with the Circuit Court of Appeals, as did counsel for the government.

The Circuit Court of Appeals says in its statement of the case that the government relies upon certain

cases. In the brief filed by the government before the Circuit Court of Appeals no authority whatever was cited or relied upon in support of the government's position. At the oral argument before the Circuit Court of Appeals, counsel for the government read to the Circuit Court of Appeals from the dissenting opinion of Judge Aldrich in the case of *Dickinson* v. *United States.* No other authority has ever been cited by the government to the knowledge of the defendants.

We desire briefly to present our views of the law governing the certified question and the authorities which we conceive support these views.

BRIEF AND ARGUMENT.

The certified question, reciting the circumstances, asks whether defendants can thus waive the right to trial and verdict by a constitutional jury of twelve men. We conceive the question to be somewhat broader, in view of the statement of the case. There was not only a waiver by the defendants, if a waiver could be made, but there was a waiver by the government and the result of the combined waivers of the government's representative and the defendants, was to create a tribunal to try the issue of guilty or not guilty of an infamous crime by a differently constituted body than that prescribed for the trial of such issue by the federal constitution.

Therefore, we think, broadly speaking, the question presented is whether or not the agreement by the representative of the government with the defendants and their counsel, can create a body unknown to the law and unknown to the constitution, to sit in lieu of a jury and determine the issue of guilt or innocence of a felony and whether the finding of such a tribunal, so created, is sufficient authority for the Federal District Judge to impose punishment of imprisonment in the penitentiary upon the defendants.

We desire first to direct the attention of the court to the case of *Thompson* v. *State of Utah,* 170 U. S. 343, 42 L. Ed. 1061. The syllabus as reported in the Law Edition, contains two pertinent paragraphs which we quote:

"The jury referred to in the Federal Constitution and in the Sixth Amendment thereto is a jury constituted, as it was at common law, of twelve persons, neither more nor less.

"It is not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt, instead of the constitutional jury of twelve."

The opinion of the court is by Mr. Justice Harlan. The defendant was indicted in the Territory of Utah in May, 1895, charged with the crime of grand larceny, to-wit: the theft of an animal. The case was first tried when Utah was a territory and by a jury composed of twelve persons. The defendant was convicted. A new trial was granted and change of venue allowed. But the second trial did not take place until after the admission of Utah into the Union as a State. At the second trial the defendant was convicted and moved for a new trial upon the ground, among others, that the jury that tried him was composed of only eight jurors, whereas, by the law in force at the time of the commission of the alleged offense, a lawful jury, in a felony case, could not be composed of less than twelve jurors. The motions for new trial and in arrest of judgment were overruled and the defendant sentenced to three years in prison. The judgment of conviction was affirmed by the Supreme Court of Utah and writ of error brought the case to the United States Supreme Court. The Supreme Court of the United States reversed the conviction upon the point stated. In the opinion Justice Harlan says:

"The Constitution of the United States provides: 'The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as Congress may by law have directed.' Art. 3, Sec. 2. And by the Sixth Amendment of the Constitution it is declared: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.'"

The court then proceeds to hold that the provisions of the Constitution of the United States relating to right of trial by jury in suits at common law, apply to the Territories of the United States, saying that is no longer an open question, and citing cases, and then states:

"Assuming, then, that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161, 1 Chitty, Crim. L. 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of his life, etc, 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those

who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.' 2 Story, Const. Sec. 1779. In Bacon's Abridgment, tit. Juries, it is said: 'The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale's P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva roce* in the presence of the judge and jury, and by the inspection and direction of the judge.' It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the Territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory."

The court then proceeds to hold that under the circumstances, the defendant Thompson was entitled to be tried to a jury of twelve persons and that the

verdict of eight jurors did not constitute a verdict upon which sentence could be pronounced.

Then the court discusses the question of the alleged waiver of the defendant of his right to the constitutional jury and says:

> "It is stated that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore, he should not be heard to say that his trial by such a jury was in violation of the constitutional rights. *It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty except one constituted of a court and a jury of twelve persons*" (italics ours).

In concluding the opinion, Mr. Justice Harlan said:

> "In our opinion the provisions of the Constitution of Utah providing for trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because in respect of such crime, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty, except by the unanimous verdict of such a jury."

In the case of *Maxwell* v. *Dow*, 176 U. S. 581, 44 L. E. 597, the opinion is by Mr. Justice Peckham and deals with the validity of the Utah state law providing for a jury of eight jurors in criminal cases not capital. The court there held that the provisions of the Sixth

Amendment to the Federal Constitution were not a limitation upon the powers of the state but were merely limitations upon the Federal Government and recognized the principles announced by the court in the case of *Thompson* v. *Utah*. The court said:

> "That a jury composed, as at common law, of twelve jurors, was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343-349. 42 L. E. 1061. 18 Sup. Ct. Rep. 620. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held" (citing cases).
>
> "It would seem to be quite plain that the provision in the Utah Constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the Sixth Amendment, provided that the amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts."

In the case of *Low, et al.* v. *United States*, 169 Fed. 86, the Circuit Court of Appeals of the Sixth Circuit had before it the question of whether or not the defendant and the Government could agree to waive a jury and submit the evidence to the court under a plea of not guilty of an offense of violating certain sections of the United States statutes which involved various punishments, the maximum punishment being a fine and imprisonment from six months to two years.

The opinion of the Circuit Court of Appeals was written by Judge Lurton, subsequently a Justice of the Supreme Court of the United States. Judge Lurton there had occasion to distinguish between "crimes" and

"petty offenses" which, at common law, were triable without a jury, holding that such petty offenses were not "crimes" within the meaning of the Constitution, and therefore as to such offenses the defendant might waive a jury, citing *Schick* v. *United States*, 195 U. S. 65, 49 L. ed. 99. Referring then to the question as to whether the offenses charged were crimes within the meaning of the Constitution, Judge Lurton says:

> "That the indictments against the plaintiffs in error included offenses for which a term of imprisonment for more than one year might have been imposed is determinative of the fact that they were not 'petty offenses' such as might have been heard by a tribunal authorized by law to act without a jury, or such as might have been presented upon information and without presentment or indictment by a grand jury."

In reaching the conclusion that there was no power in the defendant and the attorney for the government agree to waive a jury and try the plea of not guilty to the court, Judge Lurton uses some language very pertinent to the issue presented in this case. We quote:

> "The suggestion that the effect of the Sixth Amendment is to modify the force and effect of the jury clause in the Third Article by converting a constitutional requirement into a privilege which an accused may exercise or not, as he may elect, is not tenable. It is based upon the verbiage of the amendment in its first line, to-wit: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,' etc. That amendment, as we historically know, originated in the earnest desire to secure, in a definite way, the common law procedure in criminal trials. Without unanswerable reasons it should not be construed as authorizing

so grave a change in the constitutional tribunal of trials as would result if trial by jury may be waived at the option of the accused. The plain purpose of that amendment was to declare those rights appurtenant to jury trial which had from ancient times surrounded an accused. The rights and privileges so declared, says Judge Story, in his Commentaries on the Constitution, Sec. 1791, 'do but follow the established course of the common law.' The accused is not only to 'enjoy' jury trial, but a speedy trial and a public trial, by an impartial jury of the locality, be confronted by the witnesses against him, have compulsory process for his own witnesses, and, finally, the right to be assisted by counsel. The court in *Callan* v. *Wilson*, said:

" 'We do not think that the amendment was intended to supplant that part of the Third Article which relates to trial by jury. There is no necessary conflict between them.' "

Again, the court said:

" 'And as the guaranty of a trial by jury, in the Third Article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property.'

"*The right to waive a right does not exist when the matter concerns the public as well as the individual. Thus, the waiver of the trial of a crime by jury involves the setting on one side of the tribunal constituted by law for that purpose and the substitution by consent of one unknown to the*

law. It is not competent for the accused and the district attorney to change by consent the constitution of the tribunal provided for the trial of crimes. Between the waiver of a jury in a civil case and its waiver in a trial for crime, there are fundamental differences. The one involves only property rights of the parties, rights over which they have dominion. The other involves the liberty or life of a citizen. This is a matter over which the accused has no dominion. The state, the public, are concerned that neither shall be affected save by due process of law. A crime is a 'breach of public rights and duties,' which, says Blackstone, affect 'the whole community, in its social and aggregate capacity.' 3 Black. Comm. 2, 4 and 5. 'The end they have in view is the prevention of similar offenses, not atonement or expiation of crimes committed. The penalties or punishments for the enforcement of which they are means to the end, are not within the discretion or control of the parties accused; for no one has a right by his own voluntary act to surrender his liberty or part with his life.' *Caucemi* v. *People*, 18 N. Y. 128, 137. *Undoubtedly the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void.*

"It is accordingly ordered that the judgments in this case be set aside and the case remanded with direction to award a new trial" (italics ours).

In the case of *Frank, et al.* v. *United States*, 192 Fed. 864, the Circuit Court of Appeals of the Sixth

Circuit again reviewed the question of whether or not a person accused of crime might waive his right to trial by jury. The court there held again that a trial by the constitutional jury was required if the offense was a "crime" instead of a "petty offense." In the Frank case the court found that the charge was merely a petty offense in view of the fact that it was punishable by fine not exceeding $200.00 with no provision for imprisonment. In discussing the legal questions, the Circuit Court of Appeals, speaking through Judge Knappen, says:

> "The result is that if the offense for which the defendants were tried amounts to a crime, as distinguished from a 'petty offense,' it could under Section 2 of Article 3 of the Constitution of the United States, be tried only by a jury; and, if not so tried, the judgment would be a nullity and require reversal. On the other hand, if the offense is merely a 'petty offense,' the trial under waiver of jury would amount to an arbitration as to the questions of fact involved; and it would result that the court's conclusions of fact could not be reviewed here, and we would have no power to inquire into the sufficiency of the evidence to support the conviction, nor any question of law arising out of or upon the evidence."

It will be noted that the courts, in discussing cases where the constitutional jury of twelve is not required by the mandatory language of the Constitution, because the offense is a "petty offense," instead of a crime, considers that the waiver of a jury and the submission of the matter to the court is an *arbitration* of the issue of the guilt of defendant of the petty offense charged, and hold that wherever it is within the

power of the parties to waive the machinery provided by law and submit the issue of the guilt of the petty offense charged, either to a judge as an arbitrator or to a jury differently composed than the jury required by the Constitutions, the findings are binding upon the appellate court as the findings of arbitrators, and the appellate court cannot review the sufficiency of the evidence to support such findings. In other words, the court applies the well-settled principle applicable to arbitration that calls into play the principles controlling contracts so that where parties agree that a certain issue may be determined by an arbitrator, they are thereby precluded from objecting to the sufficiency of the evidence to support the finding and award of the arbitrators.

In the case of *Dickinson* v. *U. S.*, 159 Fed. 801, the Circuit Court of Appeals of the First Circuit had before it the question of the right of the accused and the representatives of the government to stipulate for the withdrawal of two jurors and the continuation of the trial to the remaining ten jurors. The charge was a misdemeanor, a violation of the banking laws, but the majority of the court construed the charge to be that of an infamous crime and treated it upon the same basis as a felony.

It appears that during the course of the trial which, as is indicated by comments of Judge Aldrich, was a trial that had been in process for almost three months, one of the jurors became ill and was unable to sit further. Thereupon a written agreement was made, signed by the defendants in person and by the United States

Attorney for the United States, wherein it was consented and agreed that the sick juror might be discharged and the further trial of the case proceed before the remaining eleven jurors with the same force and effect as if the juror had not been discharged.

Thereupon, the trial proceeded before the eleven jurors and subsequently, before the conclusion of the trial a death occurred in the family of one of the remaining eleven jurors, whereupon, a similar agreement was entered into between the defendants and the government, excusing this juror and agreeing to try the case to the remaining ten jurors with the same force and effect as if to the original twelve jurors. The ten jurors purported to return a verdict of guilty and a motion in arrest of judgment was filed by the defendants in which the attention of the court was called to the fact that there was no lawful verdict upon which sentence could be pronounced, because the verdict of the ten jurors was not the verdict of a jury within the meaning of the law and hence was void, and that no judgment and sentence should be pronounced upon it.

The trial court having overruled the motion in arrest of judgment the case was taken to the Circuit Court or Appeals. Circuit Judge Putnam delivered the opinion which was concurred in by District Judge Brown and from which opinion District Judge Aldrich dissented.

We quote from the syllabus:

> "While a person accused of an infamous crime, though not a felony, may waive the disqualification of jurors, or even their impartiality,

such person cannot waive his right to a trial by a jury of 12 by consenting, after a legal jury had been impaneled and two had been excused, to continue the trial and abide by the verdict of the remaining 10."

In the opinion of the court, the second section of Article 3 of the Constitution of the United States was quoted as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress by law may have directed."

The Fifth, Sixth and Seventh Amendments to the Constitution are quoted also, the Sixth Amendment reading:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The court, after determining that the nature of the offense, although a misdemeanor, was of such grade as to take it out of the class known as "petty offenses," and make it "an infamous crime" have this to say:

> "There is no question that it was settled law in England that, in a case of felony, the jury panel could not be weakened by waiver of the person

prosecuted. *Thompson* v. *Utah*, 170 U. S. 343, 353, 354, 18 Sup. Ct. 620, 42 L. Ed. 1061; *Queenan* v. *Oklahoma*, 190 U. S. 548, 551, 23 Sup. Ct. 762, 47 L. Ed. 1175. But with regard to misdemeanors, we have made a very diligent search, and find no pronounced practice prior to the Constitution in the English courts or elsewhere with reference to like waivers."

The court then proceeded to consider certain state decisions and quotes from Chief Justice Cooley the following language:

> "The infirmity in case of a trial by jury of less than twelve by consent would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be requiring to submit to a species of arbitration the question whether the accused has been guilty of an offense against the State."
>
> Cooley's Constitutional Limitations (7th Ed. 1903) 458, 459.

The court continues:

> "The learned jurist, in stating the direct proposition that a full panel could not be waived even by consent, adds: 'at least in case of felony.' But the principle he lays down covers every criminal proceeding where by the Constitution a common law jury is required. What we have attributed to him is quoted from the seventh edition of his Constitutional Limitations, but the same will be found in the edition of 1896, which is the last published during his lifetime. Thus it appears that he reached the result stated at the end of thirty years study and reflection."

The court then refers to the contrary decision by Chief Justice Shaw of Massachusetts, as reflected in the case of *Commonwealth* v. *Daily*, 12 Cushing, 80 where

Chief Justice Shaw, after expressing the conviction that the full jury might be waived, makes this statement:

> "But it is asked, if consent will authorize a trial before eleven jurors, why not before ten or six or one. It appears to us that it is a good answer to say that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency."

Speaking of this expression by Justice Shaw, the Circuit Court of Appeals continues:

> "We have been unable to answer satisfactorily the question which he thus asked himself to determine, or to frame any satisfactory rule by which, if the waivers at bar can be sustained, the jury may not be made to consist of one man instead of twelve. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual. Chief Justice Shaw likewise finds no solution except the discretion of the judge; but while, necessarily, the discretion of the judge is often interposed in administering the civil law, and, to a certain extent, the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind."

The court then cites the case of *Queenan* v. *Oklahoma*, 190 U. S. 548, 551, 47 L. ed. 1175. That case was

a case that went up from Oklahoma Territory. Queenan was prosecuted for murder. During the progress of the trial the Government discovered that one of the jurors had been convicted of a felony in the State of Nebraska, although the juror had answered upon examination as to his qualifications that he had not been so convicted. The United States Attorney reported this discovery to the court and to defendant and his counsel. The court asked counsel for defendant what they wished to do about the matter. They remained silent or in effect indicated that they had nothing to say and the trial proceeded. After conviction the defendant sought to set aside the conviction on the ground of the disqualification of the juror as stated.

The distinction between such a situation and the situation presented by the case at bar which involved the reduction of the number of jurors below the constitutional number is very clearly drawn in the decision of the Oklahoma Territorial Court, and, we think, in the language of the Supreme Court of the United States in affirming such decision.

The decision of the Territorial Court is reported in 71 Pacific, page 218. The syllabus, written by the court, brings out clearly the distinction to which we call attention. We quote from the syllabus:

> "The provisions in the Constitution of the United States in relation to trials by jury for crimes, and to criminal prosecutions, apply to the Territories of the United States.
>
> "The jury, within the meaning of the Federal Constitution, and the Sixth Amendment thereto, is a jury constituted as it was at common law, of twelve persons—neither more nor less.

"A constitutional right cannot be waived by the defendant or his counsel in a felony case, but a statutory right may be waived. The right of the defendant to have a trial by a jury of twelve persons is a constitutional right, which the defendant cannot waive. It is not within the power of one accused of a felony, by consent expressly given or by his silence to authorize a jury of less than twelve persons to pass upon his guilt or innocence.

"At common law the fact that a juror was an alien, or that he had been convicted of a crime, were causes of challenge *propter defectum;* and there was no distinction at common law between a person who was convicted of a felony and one who was an alien. Most of the states of the Union have statutes which make such disqualifications of a juror a cause of challenge, and these statutes are but declaratory of the common law.

"Where one of the jurors in a trial for murder had been convicted of a felony, although cause of challenge *propter defectum*, it is not a denial of due process of law, or of the equal protection of the laws to the person convicted, within the meaning of the Federal Constitution.

"A known ground of disqualification to a juror, before or during the process of the trial, is waived by withholding it or refusing or declining to raise the objection until after verdict."

Commenting on the above, the Territorial Court emphatically says:

"It is not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of less than twelve persons to pass upon his guilt or innocence,"

but at the same time the court holds in the Queenan case that the ordinary statutes for disqualifying from jury service an alien or a person convicted of felony,

were but declaratory of the common law, and holds that a known ground of disqualification to a juror before or during the progress of the trial is waived by withholding it or refusing or declining to raise the objection until after verdict.

In the opinion, the court cites the case of *Thompson* v. *Utah*, 170 U. S. 345, in support of the general principle as expressed by it:

> "And the jury referred to in the Federal Constitution and the Sixth Amendment thereto, is the jury constituted as it was at common law, of twelve persons—neither more nor less."

The decision of the Territorial Court is not referred to by the decision of the Circuit Court of Appeals in the Dickinson case, but the decision of the Supreme Court is referred to and quoted as follows:

> "The court asked the counsel for the prisoner what they desired to do and its intimation indicated that if the objection were pressed the juror would be excused. *This, of course, meant that the trial would have to be begun over again.* The counsel for the prisoner answered that they had nothing to say, and the trial went on. It is now argued that the defendant was deprived of a constitutional right which he could not waive. *Thompson* v. *Utah*, 170 U. S. 343, 18 Supt. Ct. 620, 42 L. ed. 1061. The contrary plainly is the law, as well for the Territories as for the States" (italics ours).

After quoting the above statement from the opinion of the United States Supreme Court, the Circuit Court of Appeals says:

> "This statement that, if the juror had been excused, the trial would have had to be begun over again makes an authoritative determination of a

distinction which applies as much to misdemeanors as to felonies, to the effect that it does not follow that, because objections to the qualifications of jurors can be waived, a reduction in their number can also be waived. Therefore, so far as this point is concerned, the United States can take no advantage."

The final conclusion of the Circuit Court of Appeals was, as stated in the quoted paragraph of the syllabus, that the verdict of the ten jurors was not a lawful verdict upon which sentence could be pronounced and the judgment and sentence was set aside and the case remanded to the trial court.

It is true that District Judge Aldrich dissented in the foregoing case, but a careful examination of his dissent indicates that he had two thoughts in mind. First, that the offense charged was of a grade of misdemeanor and not a felony. Second, he conceived the idea that if the trial started out with a sufficient number of jurors, to-wit: with twelve jurors, it might subsequently be depleted, although conceding the lack of jurisdiction if the trial had commenced with less than twelve jurors. In other words, the learned judge seemed to have the idea that if jurisdiction was attached by virtue of the impanelling of a constitutional jury of twelve, no subsequent happening in the case which might reduce the panel would prevent a verdict of the panel from being valid, and he particularly called attention to the long trial which had continued for almost three months, but, at page 823 of the Federal Reporter, the dissenting judge makes this statement:

"Upon the extreme proposition that an accused, in cases involving certain grades of felony,

> may waive his constitutional right and go to trial with less than twelve, as well as upon the less extreme proposition that he may waive the loss of a juror from a properly constituted tribunal, during the course of a felony trial, there is conflict, involving a field of discussion which we need not enter, because it is foreign to the question under consideration."

The above statement shows that even the dissenting opinion of the district judge in the Dickinson case was not intended to relate to a case like the case at bar where the indictment was for felony involving, as the sentence in this case exemplifies, a long period of penal servitude.

That the learned district judge in his dissenting opinion was in error in assuming that if a lawful jury was impaneled it continued to be a lawful jury although it was diminished below the constitutional number by stipulation during the trial, is shown by the decision of the Circuit Court of Appeals of the Second Circuit in the case of *Freeman* v. *United States*, 227 Fed. 732. The direct question involved in the Freeman case was as to whether or not a change in the trial judge could take place during the trial without making the subsequent proceedings void, although the change in the trial judge was made with the consent of the defendant and the government. The conclusion of the lengthy consideration of this case is found at pages 759-760, as follows:

> "It is the opinion of this court that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning

to the end. It is not possible for either the government or the accused or both, to consent to a substitution either of one judge for another judge or of one juror for another juror. The continuous presence of the same judge and jury is actually essential throughout the whole of the trial."

The result, of course, was a reversal of the judgment.

The discussion offered in the opinion is interesting and is pertinent to the question before this court.

After disposing of the preliminary question on motion to dismiss the writ of error, the court takes up the merits of the case at page 741, and enters into a discussion of the constitutional provisions we have heretofore cited and goes back to the common law, stating:

"But by the time of the reign of Henry VII, Hallam says:

" 'The fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offense occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made.' "

The Circuit Court of Appeals continues:

"The English-speaking people of the world over have this year (1915) commemorated the seven hundredth anniversary of the signing of Magna Charta. That instrument declared that no freeman should be deprived of life or liberty 'but by the judgment of his peers or by the law of the land,' and this has been expounded as referring to a trial of all persons by a jury of twelve men, although strictly speaking it is more likely that it referred to the trial of the barons by their peers. The Constitution of the United States as

originally adopted provides in the third article as follows:

"'The trial of all crimes, except in cases of impeachment, shall be by jury.'"

The court then deals with the first ten amendments to the Constitution which were proposed by the First Congress, and says:

"The defendant is accused of a crime for which he is entitled to trial by jury within the meaning of the Third Article of the Constitution of the United States. The Supreme Court in *Callan* v. *Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223, construed that article as embracing, not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanors, the punishment of which may involve the deprivation of the liberty of the citizen."

The court then cites the case of *Lamb* v. *Lane*, 4 Ohio St. 167-169, where in 1854, the court, after a careful examination of the subject:

"announced that it was clearly of the opinion that the word 'jury,' where it occurs in the state constitution, 'means a tribunal of twelve men, presided over by a court and hearing the allegations, evidence and arguments of the parties.' And the opinion was expressed that twelve men 'can never be properly regarded as a jury' unless presided over by a court and that a 'presiding law tribunal is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial.'"

The court then cites the case of *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 585, 43 L. ed. 873, where the Supreme Court held that trial by jury in the primary and usual sense of the term, at

common law, is not merely a trial by jury of twelve men before an officer vested with authority, etc., but that it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them in the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence. The Supreme Court of the United States is quoted as saying:

> "This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

Continuing, the Circuit Court says:

> "As the Constitution specifically declares that 'the trial of all crimes * * * *shall be by jury*' it is difficult to see how it can be maintained that the trial of a crime in a federal court need not be by jury, provided the accused persons consent to be tried in some other manner. The question of how he shall be tried does not seem open to his determination but appears to have been settled for him by the mandatory provision of the Constitution of the United States, however it might be under the Constitution of the state differently worded. It is necessary, too, to have in mind that the trial of one charged with crime affects not merely the rights of the accused but the public interests. As Blackstone expressed it, 4 Commentaries, page 189, 'the king has an interest in the preservation of all his subjects.' The Declaration of Independence declares that all men are endowed by their Creator with certain inalienable rights; that among these are life, *liberty* and the pursuit of happiness. In his great work on Constitutional Limitations, p. 576, Judge Cooley, discussing waiver of rights, said that:

"'Consent in a criminal case cannot bind the defendant "since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the state, whether the individual assented or not."'"

The court then refers to the case of *Crain* v. *U. S.*, 162 U. S. 625, 40 L. ed. 1097, where the Supreme Court of the United States sets aside a judgment of conviction for forgery and a sentence of imprisonment for three years, because the record did not affirmatively show that the accused had been formally arraigned or that he pleaded to the indictment, although it showed that the jury had been duly selected, impaneled and sworn to try the issues joined. The government in that case claimed that it should be assumed that the defendant had pleaded not guilty and failure to record the fact was a clerical error which did not prejudice his substantial rights. Mr. Justice Harlan, writing the opinion of the court, said:

"In *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, this court, observing that the public has an interest in the life and liberty of an accused person, said:

"'Neither can be lawfully taken except in the mode prescribed by law.'

"'That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.'"

Justice Harlan then added:

"The present defendant may be guilty, and may deserve the full punishment imposed upon

him by the sentence of the court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

The Circuit Court of Appeals then quotes from the case of *Low* v. *U. S.*, 169 Fed. 86, being an opinion by Mr. Justice Lurton while upon the circuit, and which case we have previously considered and cited, and the court refers to the Constitutions of California, Montana and Virginia upon the subject of trial by jury, stating that, of course, while the state constitutions have no application to trial in the federal court for offenses against the United States, they are interesting as showing the deep-seated conviction of the people of the various commonwealths that the life and liberty of the citizens of this country "should be protected by the courts against forfeiture, except in accordance with the established principles of law, which cannot be waived by the voluntary action of the individual."

The court then considers the difference between civil and criminal cases and between the language of the constitutional provisions relating thereto and between the rights of the parties concerned, to waive trial by jury. The court also considers the right to waive a jury trial when a person is accused of a minor offense because the Constitution secures a jury trial only in cases in which it is a matter of right at common law, citing the case of *Shick* v. *United States*, 195 U. S. 65, 49 L. ed. 99.

Judge Thompson in his work on Trials, Section 6, is quoted by the court as stating:

> "While in cases of felony the constitutional right to be tried by a jury of twelve men cannot be waived by the accused, in cases of misdemeanor the rule is different, especially where the punishment is a pecuniary fine merely."

The court then cites the case of *West* v. *State,* 42 Fla. 244, 28 So. 430, where the court said:

> "The common law rule is that in a trial for felony, if a juror, the judge or the prisoner become incapacitated, by illness or death, after the jury is impaneled and sworn in chief, the proper course to pursue is to declare a mistrial and begin *de novo.*"

After citing several state cases including cases from Mississippi, Nevada, West Virginia, Georgia, Iowa and California, to the effect that where a juror is excused owing to sickness, the trial must begin *de novo,* the court then refers to the case of *Caucemi* v. *People,* 18 N. Y. 128, where it appears that a juror was withdrawn from the panel of twelve, in pursuance of a stipulation signed by the accused and filed in open court, the stipulation reciting that the verdict might be rendered by the eleven jurors and that "the twelve names now appearing of record as the jury in this case may remain, so that by the record, this case shall appear to have been tried by twelve jurors." The New York Court held that this invalidated the trial, the consent of the prisoner being a nullity and the conviction illegal. After referring to the holding by the New York Court that the state had an interest in the preservation of the liberties and lives of the citizens, it states:

"As a criminal prosecution may result in a forfeiture of the life or liberty of the accused the consent of the latter 'should not be permitted to extend so far to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws.'"

The court further says:

"The opinion points out that consent may, in many particulars, affect the proceedings; that objections to jurors may be waived; that the court may be substituted for triers to dispose of challenges to jurors; that secondary evidence may be received in place of primary evidence; that admissions of fact may be allowed. 'But, when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change nor has the defendant.'"

The court then points out the difference between the language of the Constitution of the United States and the language of the Constitution of Iowa in explanation of the decision of the Iowa court in the case of *State* v. *Kaufman*, 51 Iowa 578, and then refers to the case of *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, heretofore considered by us in this brief.

The court then proceeds to consider authorities dealing with the substitution of judges during the trial and reaches the conclusion stated in opening our discussion of this case.

A recent decision from the Circuit Court of Appeals of the Fourth Circuit is found in the case of *Grove* v. *U. S.*, 3 Fed (2nd) 965. That case is not

directly in point upon the proposition here presented, but shows the sympathetic view of the Circuit Court of Appeals of the Fourth Circuit concerning the principles we contend are applicable. In the Grove case a jury was impaneled and sworn to try the defendant and the evidence was partially heard when one juror became ill. The judge there did what we conceive to have been the mandatory duty of the trial judge in this case. That is, he declared a mistrial but by consent of the parties another juror was drawn to fill the box with the remaining eleven jurors and the trial opened again. To expedite the trial, it was agreed between the government and accused that the witnesses which had been used before the other jury might be recalled to the stand and sworn to state that the testimony they had previously given was true and then that the stenographer might, to expedite matters, read the testimony, both direct and cross examination that had been taken before the other jury. Either party was given the right to ask other or additional questions of the witnesses if desired. Upon conviction the defendants complained that the proceeding was irregular and, indeed, one of the circuit judges, Judge Waddill, was of the opinion that the proceeding was irregular but the other two judges were of the opinion that all of the rights of the accused were preserved to him and that while the eleven jurors who had sat in the first trial of the case were disqualified and could not have been forced upon him, that he might waive the disqualification of the jurors, which he expressly agreed to do. This, we conceive to be in accordance with the

principles announced in the Queenan case, but the procedure showed a clear recognition of the fact that before a lawful verdict could be returned in the case there must be twelve jurors concurring in the verdict. Otherwise, it was not the verdict of a *jury* because there was no *jury*, as defined by common law and adopted by our Constitution, to return a verdict unless there were twelve members participating in the verdict. It was, in our opinion, and as stated by the learned courts we have cited, but a mere arbitration—a substantial change in the forum provided by the Constitution for the trial of pleas of not guilty in felony cases, and furnished no basis upon which the trial court could pronounce a lawful judgment and sentence.

The case of *Rassmussen* v. *U. S.*, 197 U. S. 516, 49 L. ed. 862, involved the constitutionality of an Act of Congress which purported to fix for Alaska Territory a jury of six men to try misdemeanor cases. The court in that case referred with approval to its former decision in *Thompson* v. *Utah*, (*supra*) and held the Act of Congress unconstitutional and void in that it was repugnant to the Sixth Amendment to the Constitution. The opinion of the court was rendered by Mr. Justice White and concurring opinions were filed by both Mr. Justice Harlan and Mr. Justice Brown.

The case of *Diaz* v. *United States*, 223 U. S. 442, 56 L. Ed. 500, was a case involving a trial in the Philippine Islands where the defendant had voluntarily absented himself from the court room during the examination of some of the witnesses, but had consented that examination might be made in his absence. Mr.

Justice VanDevanter writes the opinion of the court, holding, in substance, that this particular privilege of the accused might be waived, but distinguishing the case from the case of *Thompson* v. *Utah*, where the tribunal was by consent attempted to be changed from that provided by law for the trial of felonies. Distinguishing between the case cited and referring to the Thompson case, Justice VanDevanter said:

> "And in the other (Thompson) case the question was whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law, to try him; and it was held he could not."

The Circuit Court of Appeals of the Ninth Circuit, in an opinion rendered February 11th, 1929, in the case of *Gibson, et al.* v. *U. S.*, 31 Fed. (2nd) 19, had occasion to voice again the well understood rule announced in the cases we have previously cited. In the Gibson case, which was a conspiracy trial, the hearing was had in the State of Washington and following the state practice, the court had caused to be selected and qualified, at the time the jury was impaneled, a thirteenth or alternate juror. This was done by consent of both the government and the defendant. However, no exigency arose for the purported use of the thirteenth juror and he was excused prior to the submission of the case to the jury by the court. Defendant urged for the first time on appeal error in permitting the thirteenth juror to be selected. The court held that there was

no federal statute authorizing such practice but that the juror had never served nor functioned as a juror in the case and only the original twelve men had acted throughout the case and in the verdict and therefore there was no prejudicial error occurring. The court, however, in its opinion, 31 Fed. (2nd) page 21, had occasion to make this observation:

> "There is no federal statute authorizing such a practice and it is to be conceded that in a federal court the defendant charged with a felony has the right to trial by jury, and, further, that by jury is meant a body of twelve and that such right cannot be waived."

Citing Constitution of United States, Art. 3, Sec. 2.
Maxwell v. *Dow*, 176 U. S. 586.
Thompson v. *Utah*, 170 U. S. 343.
Rasmussen v. *U. S.*, 197 U. S. 516.
Low v. *U. S.*, 169 Fed. 86-91.

We have heretofore considered all of these cited cases.

A rather clearly reasoned case is that of *Territory of Montana* v. *Ah Wah, et al.* Opinion was rendered by Mr. Chief Justice Wade of the territorial court and is reported in 1st Pac. 732.

Upon a trial for murder, one of the jurors was excused on account of sickness in his family and the trial proceeded to a final conclusion before the remaining eleven jurors who found the defendant guilty. The juror was excused with the consent of the defendants and the trial continued to the eleven jurors by agreement. It is true the case was a capital case. There appears to be no distinction drawn or susceptible of being drawn in federal practice between a capital case

and any other felony. In the opinion the Montana jurist uses the following pertinent language:

> "The law has established certain tribunals, with defined powers and forms of proceedings, for the trial of persons charged with crime. Security to the defendant and to the public is only found in a strict compliance with the law of the land. Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the prosecution nor the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled. If, with the consent of the court and the prosecution, the defendant may have a trial with one juryman less than a constitutional jury, why, with like consent, might he not have a trial with one juryman more than a constitutional jury? If by his own act the defendant might take one from a lawful jury, we do not see why he might not add one thereto. In either case there would be a failure of jurisdiction, because jurisdiction attaches to and makes valid a verdict when rendered by a jury, and a jury is 12 men. * * * By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration."

The court then cites the case of *Caucemi* v. *People*, 18 N. Y. 136 to which we have heretofore called attention. The Montana court further cites the case of *State* v. *Mansfreed*, 41 Mo. 470, where the opinion is by Justice Wagner who cites Chitty as follows:

> "'The petit jury,' says Chitty, 'must consist of precisely twelve, and is never to be more or less, and this fact it is necessary to insert upon the record. If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed on error.' 1 Chit. Crim. Law, 505."

Judge Wagner made the further pertinent observation:

> "Another good and sufficient reason, it occurs to us, is that the prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can, unquestionably, waive many of his legal rights and privileges. He may agree to certain facts, and dispense with formal proofs; he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; but he has no power to consent to the creation of a new tribunal, unknown to the law, to try his offense. The law, in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards and should be clear, definite and absolute."

The Montana court further cites the case of *Hill* v. *People,* 16 Mich. 357, where the Michigan court holds to the same view and cites various earlier cases to the effect that the government and the defendant cannot, by agreement, create a tribunal unknown to the law to try a plea of not guilty in a felony case. The Michigan court is quoted as using this pertinent language:

> "Let it once be settled that a defendant may thus waive his constitutional rights, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or

neglect might be recognized as a waiver in one case and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of the courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

Conclusion.

In conclusion let us respectfully submit to the court that although there was evidently an attempt made in good faith by the United States Attorney and the defendants and their counsel to avoid the retrial of this case, made necessary by the unfortunate illness of a member of the jury, it is so apparent that the parties could not, by agreement, change the tribunal provided by the Constitution for the trial of the defendants' plea of not guilty, that we respectfully submit that the settled rule of law in this court and in the Federal Courts, supported by the weight of authority and reasoning of the various state courts, requires that this court answer the certified question in the negative and advise the circuit court of appeals that the purported verdict of eleven jurors was a nullity and was insufficient to support a judgment of conviction by the trial court.

Very respectfully submitted,

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